

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB. 11, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leidseplein Presse B.V.

Serial No. 75/077,331

Jay H. Begler of Harris Beach & Wilcox for Leidseplein Presse
B.V.

Andrew D. Lawrence, Trademark Senior Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before Simms, Hairston and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Leidseplein Presse B.V. to
register the following mark for "jewelry, namely decorative pins"
and "clothing, namely T-shirts, hats and scarves."¹

¹ Application Serial No. 75/077,331, filed March 22, 1996 alleging
dates of first use of January 1, 1995. The application contains a
statement that the stippling in the drawing appears for shading
purposes only, and not to indicate color.



The Trademark Senior Attorney has refused registration under Sections 1, 2 and 45 of the Trademark Act on the ground that the matter sought to be registered, as used on the goods, is ornamental and does not function as a trademark to indicate the source or origin of the goods.

Applicant has appealed from the refusal to register. Applicant and the Trademark Senior Attorney have filed briefs. An oral hearing was requested, but the request was subsequently withdrawn.

Applicant argues that its "representation of a devil" design is not merely ornamental but rather serves to identify a secondary source when applied to its goods as it is associated with the rock band AC/DC and its lead singer Angus Young. Applicant has submitted a declaration by the band's account manager, Mr. Michael Klein, and three full-text articles from the NEXIS database to demonstrate a relationship between the asserted mark and the band.

By his declaration, Mr. Klein states that he has been "associated with" the band AC/DC since 1988, that the band is "known worldwide," and that the band has had "global album sales of over 80 million records and compact discs" since its founding in the early 1970's. According to Mr. Klein, since 1974² lead guitarist Angus Young, when performing in concert, has worn a prep school outfit consisting of shorts, matching jacket and "rep" tie. Mr. Klein asserts that the long hair, cap with the letter "A" and especially the outfit worn by the "devil" are all source identifiers of Mr. Young, that the designation is "clearly meant to evoke Mr. Young's image, that this image of Mr. Young is known to his fans worldwide, and that anyone familiar with the AC/DC band "immediately associate[s] Mr. Young with AC/DC."

The NEXIS references submitted by applicant contain the following descriptions of the appearance and performing style of Mr. Young:

....Wearing his signature Eaton schoolboy uniform, [Angus Young] performed....For the encore, AC/DC performed two of their most anticipated anthems....featuring Angus prancing around in devil's horns.... *Telegram & Gazette* (Worcester, MA) September 9, 1996.

And then [Angus Young will] appear under a column of light in blazer, shorts, and schoolcap with devil's horns.... At the gigs Angus's School-boy outfit attracted wild applause.... *The Herald* (Glasgow) May 31, 1996.

² The basis for Mr. Klein's knowledge of the band's and Mr. Young's activities prior to his association with the band in 1988 is unclear and unexplained in the declaration.

...AC/DC's Angus Young still fidgets his way round the stage like a half-crazed schoolboy in disgrace....Standing outside the band's dressing room, the MTV lunkheads demanded, "Open up and give us some chicks," only to be greeted by a cartoon Angus dressed as a devil. *Pittsburgh Post-Gazette*, March 26, 1996.

The Trademark Senior Attorney maintains that the matter sought to be registered is only used in an ornamental fashion. The designation is described by the Senior Attorney as being "merely emblazoned" on the front of the T-shirts and hats "where ornamentation typically resides," as a pattern comprising "a major part of the area" of the scarves, and for the jewelry, "it comprises virtually the entire goods." The Senior Attorney argues that the evidence submitted by applicant to demonstrate secondary source is insufficient.³ It is the Senior Attorney's position that although Mr. Young may be known for wearing "a particular outfit," there is no indication "who Mr. Young is" other than a member of the band and there is nothing to show this attire "has been adopted as some form of intellectual property of the applicant." The Senior Attorney further argues that since no photographs of Mr. Young have ever been submitted, despite the assertion that he has been wearing the claimed outfit since 1974, there is no way to find that the attire as shown in the proposed mark bears any similarities to Mr. Young's apparel "beyond the

³ For an explanation of the concept of secondary source, see TMEP § 1202.04(c).

very generalized descriptions provided." The Senior Attorney contends that despite the absence of any photographic evidence, it is apparent that the proposed mark is not intended to be a life-like depiction of a particular person.⁴

It is well settled that matter which serves as part of the aesthetic ornamentation of goods, such as T-shirts, may nevertheless be registered as a trademark for such goods if it also serves a source-indicating function. In re Dimitri's Inc., 9 USPQ2d 1666 (TTAB 1988). Ornamental matter may additionally serve a source-indicating function if, for example, it is distinctive for any other goods or services, such that the distinctiveness carries over to use on collateral products such as clothing. See In re Pro-Line Corp., 28 USPQ2d 1141 (TTAB 1993) and In re Paramount Pictures Corporation, 213 USPQ 1111 (TTAB 1982).

The specimens in this case consist of photographs of each of the identified goods. Copies of the photographs showing the designation as it appears on applicant's T-shirts, scarves and decorative pins are reproduced below.

⁴ The Senior Attorney also argues for the first time in his brief that applicant has not shown "that anything Mr. Young has done functions as the acts of applicant." Any possible questions concerning the relationship between applicant, Angus Young and the band, AC/DC, and any ownership issues relating thereto were never raised by the Senior Attorney during the prosecution of the application and are therefore considered to be waived.

The Senior Attorney has accurately described the manner in which the asserted mark is displayed on the specimens. However, merely because the designation "is emblazoned" across the front of the goods, as it appears on the T-shirt in this case, or "comprises virtually the entire goods," as it does on the jewelry in this case, does not mean that the matter does not function as a mark. The question is whether the designation, as used, performs the function of a trademark by signifying to relevant purchasers that the goods come from a particular entity.⁵ See, for example, *In re Paramount Pictures Corporation*, supra and *In re Expo*, 189 USPQ 48 (TTAB 1975).

The relevant purchasers of the goods in this case are apt to include those familiar with the band, AC/DC, and we believe that

⁵ A jewelry design is registrable if the design is the trademark. See *In re Penthouse International Ltd.*, 565 F.2d 679, 195 USPQ 698 (CCPA 1977). Moreover, the capacity of a designation to indicate origin is not lost merely because the mark is repeated in an eye-catching pattern or even if it covers the entire surface of the goods. *In re Paramount Pictures Corporation*, 213 USPQ 1111 (TTAB 1982) citing *Vuitton et Fils, S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 212 USPQ 85 (9th Cir. 1981).

such persons would perceive the matter sought to be registered as a trademark.⁶

Mr. Klein, in his declaration, has established (and indeed there is no dispute) that AC/DC is the name of a well-known rock band. It is also clear from the declaration that Angus Young has been performing with the band as its lead singer for many years. The uncontroverted evidence further demonstrates that Mr. Young, when performing on stage, wears a "signature" prep school outfit, consisting at least in part of shorts, blazer and a "school boy" cap. In addition, Mr. Young has been described as wearing a "schoolcap" sporting "devils horns" during at least one of his stage performances. We find that the evidence, as a whole, establishes that the relevant public would closely associate the image depicted in the application with Mr. Young's actual performances or appearances on stage.⁷ Thus, it could be argued that Mr. Young's distinctive stage dress functions as a mark for entertainment services. As such, the distinctiveness carries over to use of the simulation of this appearance by applicant on

⁶ It is immaterial whether the actual identity of the source is known. See *In re Paramount*, supra and *Johnson & Johnson v. E.I. du Pont de Nemours and Company, Incorporated*, 181 USPQ 790 (TTAB 1974).

⁷ While we note that one of the NEXIS articles is from a foreign publication, we believe that the article is of some probative value in establishing that Mr. Young seems to consistently convey a particular image on stage.

collateral products, including T-shirts, scarves and decorative pins.⁸

It is not clear why applicant failed to submit a photograph of Mr. Young performing on stage. And obviously, the character sought to be registered is not intended to be a realistic depiction of Mr. Young or, for that matter, any human being. Nevertheless, the written description of Mr. Young's image provided by Mr. Klein together with the characterizations of Mr. Young in the NEXIS articles submitted by applicant are sufficient to demonstrate that the character is designed to conjure a stylized image of Mr. Young, and that an association or a connection between Mr. Young and this characterization of Mr. Young would be drawn by the relevant public.

In view of the foregoing, we find that the design sought to be registered functions as a trademark for applicant's goods.

Decision: The refusal to register is reversed.

R. L. Simms

P. T. Hairston

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

⁸ The nature of the character sought to be registered and its manner of use by applicant is not unlike that of a sports team mascot and the way in which the rendering of that mascot is applied to promotional merchandise such as T-shirts, caps and jackets.

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